

April 13, 2016

Mr. Russell Begaye, President  
The Navajo Nation  
100 Parkway  
P.O. Box 7440  
Window Rock, Arizona 86515

Dear President Begaye,

Thank you for your letter of March 15, 2016 regarding the EPA response to the Gold King Mine release, and our on-going dialog on related issues.

Our 32 year partnership with the Navajo Nation has been based on a foundation of mutual respect and accountability, rooted in our 1984 Indian Policy, and respect for the sovereignty of the Navajo Nation. Beyond the \$93 million in funding that EPA has provided to Navajo Nation since 1984, EPA has supported your government's leadership in establishing your own environmental programs. We have many challenges ahead of us to help address public health and environmental threats faced by Navajo communities, including the need for water infrastructure improvements, programs to address air quality, and the extensive coordination needed to address the legacy of abandoned uranium mines on or near the Nation.

The Gold King Mine release was an unfortunate accident. As you know, the accident occurred while the Agency was investigating ways to address a continuous source of acid mine drainage from this particular mine. This type of investigation and response work is an integral part of the Agency's mission—in FY 15 we conducted \_\_ response actions.

The Gold King Mine release threw into sharp relief the need to respond to the threats posed to downstream communities by acid mine drainage from this area. Since the release EPA has expended over \$\_ million on response efforts, including reimbursing over \$\_\_ to state, tribal, and local jurisdictions for reasonable and necessary response costs that were incurred by those jurisdictions as a result of the release. EPA has provided \$157,000 in reimbursement to Navajo agencies for costs incurred between August 5<sup>th</sup> and September 2<sup>nd</sup>, 2015, and the Navajo Nation is presently reviewing the terms of that award. EPA is continuing to review costs incurred by the Navajo government as additional information about these costs is made available.

EPA also recognizes that it is of crucial importance to provide river users with accurate and timely information about water quality in the Animas and San Juan rivers following the release, and the Agency remains committed to full transparency with respect to data collection efforts. EPA has continuously posted water quality data to the Gold King Mine website as it has become available, and has also sought to share its interpretation of the data with stakeholder groups. The data EPA collected from the San Juan River in the Fall of last year did not show exceedances of Navajo Nation agricultural water quality standards, or of EPA recreational screening levels. In addition, modelling performed by EPA's Office of Research and Development concluded that dissolved metals concentrations returned to background levels within hours after the plume

passed at all sites. EPA has shared, and will continue to share the data it has collected with the Navajo Nation, and is fully open to reviewing and discussing any data or analysis that is generated by other investigators.

Looking beyond the August 5<sup>th</sup> release, EPA acknowledges that acid mine drainage is a continuing concern for downstream users of the Animas and San Juan Rivers. In order to comprehensively address the source of this problem, on April 6, 2016 EPA proposed the Bonita Peak Mining District to the National Priorities List (NPL). Placement of a site on the NPL makes it eligible for federal cleanup funds, which is especially important when private parties are no longer present to address environmental contamination.

More detailed information related to the concerns you raised in your March 15 letter are included in the attached document.

EPA recognizes that the San Juan River has great spiritual and cultural significance to the Navajo Nation and look forward to working with you on continued efforts to protect this precious resource.

Sincerely,

Gina McCarthy  
Administrator  
U.S. EPA

## **Detailed Information Related to Concerns Raised**

### Support in Listing the Upper Animas Mining District on the National Priorities List

After obtaining a letter in support of the proposed listing from the Colorado governor this February, EPA announced the proposed listing of the Bonita Peak Mining District on April 6, 2016. The Bonita Peak site includes Gold King Mine and 47 other mines and mining related areas in the Upper Animas, Mineral Creek, and Cement Creek watersheds in San Juan County, Colorado. The sixty day public comment period for the proposed listing started on April 7.

### Fair And Independent Assessment of EPA's Role in the Gold King Mine Release

In the aftermath of the release, EPA initiated an internal review and released an Internal Review Summary Report on August 26, 2016 which includes an assessment of the events and potential factors contributing to the Gold King Mine incident. EPA also sought an independent evaluation of the events surrounding the Gold King Mine release from experts at the U.S. Department of Interior, and received the results of that investigation on October 8, 2015. This evaluation was conducted by the Bureau of Reclamation, and peer reviewed by the U.S. Geological Survey, and the U.S. Army Corps of Engineers. Finally, the Agency is awaiting a report by the Office of Inspector General (OIG) following its own review of the matter.

### An Interim Claims Process and Fund to Pay Claims on an Ongoing Basis

Based on meetings between the Navajo Nation and my staff, I understand your request to establish an interim claims process under the Federal Tort Claims Act (FTCA). The FTCA creates an administrative process by which agencies can settle certain claims asserted against the government, but the terms of the statute do not permit establishment of an interim claims process. As noted in the November 3, 2015 letter from Avi Garbow, EPA General Counsel, to Ethel Branch, Navajo Nation Attorney General, the FTCA requires that a claimant's settlement of a claim under the FTCA be considered a final settlement for that claimant. Under the terms of the Act, the settlement of an administrative claim for money damages is final and conclusive as to the settling claimant and a settlement constitutes a complete release for claims relating to the "same subject matter." 28 U.S.C. § 2672. The Department of Justice takes the position that the "subject matter" in this case would be the Gold King Mine release on August 5, 2015, and that any settlement negotiated and agreed to by a claimant would bar all future claims for damages arising from that incident. Consequently, we do not have the ability to establish an interim claims process by amending the Standard Form 95.

Because it is not unusual for Federal Tort Claims Act (FTCA) claimants to need additional time to assess their damages, the FTCA allows a claimant up to two years from the date of accrual to assess damages and file a claim. 28 U.S.C. §2401(b). Once a claim is timely filed, a claimant may amend her claim to account for subsequently discovered damages based upon any additional information available to the claimant, provided that amendment is made "prior to final action by [the Claims Officer], or prior to the claimant's exercise of the option to bring suit under 28 U.S.C. § 2675(a)." 40 C.F.R. § 10.2(b). By amending a claim as more information becomes available, a claimant should be able to account for all damages upon which a settlement could be

reached.

#### Funds for an On-Site Laboratory on Navajo Land and Emergency Preparedness

EPA has had a number of conversations with Dr. Benn, Executive Director of Navajo Nation EPA, about resources that can be used for a laboratory and to increase Navajo Nation's emergency response capabilities. In these conversations, EPA has also noted that the Navajo Tribal Utility Authority (NTUA) laboratory has been certified by EPA for conducting bacteriological and primary inorganics analysis.

In a November 30, 2015 letter from Enrique Manzanilla, Superfund Division Director, EPA Region 9, to Dr. Benn, and in an April 1, 2016 letter from Craig Wills, Grants Management Office, EPA Region 9, to Dr. Benn and Cordell Shortey, Office of Management and Budget, EPA highlighted the \$386,724 in Tribal Response funds that Navajo Nation received to construct or purchase a new building to house the Navajo Superfund Program. These funds were approved for the design and construction of a new building that could include laboratory facilities to support sample preparation, instrument calibration, and equipment storage and maintenance. To date, none of \$386,724 has been expended. As noted in the April 1, 2016 letter, if these funds are not used by September 30, 2016, they will no longer be available.

With respect to emergency preparedness, in a November 19, 2015 letter from Enrique Manzanilla to Dr. Benn, EPA provided a list of resources administered by EPA, DOT and FEMA that are available to assist tribes and other jurisdictions in the development of emergency response programs.

Moreover, Navajo Nation currently has an additional \$79,201 in unexpended Tribal Response Program (CERCLA Section 128(a)) funding. This funding, which EPA provides to Navajo Nation through grant agreements, can be used to increase Navajo Nation's laboratory resources or emergency response capacity. As noted in the April 1, 2016 letter from Craig Wills, these funds will also be swept if they are not spent by September 30, 2016, the date the grants are set to expire.

#### Monitoring and Research

One of our foremost priorities during the response overall was collecting information to help ensure the health and safety of affected communities and to make sure that such information was publically available. In addition, EPA created a Gold King Mine website, [ [HYPERLINK "http://www2.epa.gov/goldkingmine"](http://www2.epa.gov/goldkingmine) ], which contains comprehensive information about EPA's response to the release, including sampling results, status updates, and documents pertaining to EPA's previous, ongoing and long-term work in the area.

In order to assess the impact of the release on downstream water quality, EPA, along with state, local and tribal partners has conducted extensive sampling within the Animas and San Juan Rivers, and Lake Powell since the spill occurred on August 5, 2015. The results of this sampling are posted on the Gold King Mine website referenced above. Sampling activities began immediately following the spill, and included collection of both water quality and sediment

samples. Water quality samples were collected daily beginning on August 6, 2015, while sediment sampling began on August 10, 2015. Samples were collected from locations throughout the watershed, including multiple locations in Colorado, New Mexico, and the Navajo Nation. Surface water samples taken prior to the plume's arrival were used to establish a baseline for water quality comparisons. As of October 13, 2015, the EPA had collected 1,489 surface water samples and 1,113 sediment samples for the response. In addition to our own analysis, EPA has offered Navajo Nation third party review of data and third party collection of supplemental data.

Each surface water sample was analyzed for 24 metals, including arsenic, cadmium, lead and mercury. Surface water samples were collected on August 6, 2015, at two locations prior to arrival of the plume along the Animas and San Juan Rivers in New Mexico. EPA compared these sample results to data obtained before the spill, and to samples obtained immediately after the spill from portions of the rivers where the plume from the spill had not yet reached. Sampling data taken since the event indicates that metals and other constituents in water and sediment returned to pre-event conditions by the middle of August. Indeed, most jurisdictions impacted by the release lifted restrictions by that time. On August 24, Navajo Nation announced that restrictions would be kept in place for the San Juan River though Navajo Nation EPA reported that initial data from their water samples concurred with data from neighboring jurisdictions in supporting that water from the San Juan River was safe for irrigation purposes. On August 28, 2015, the President lifted irrigation restrictions on the San Juan River for the Chapters of Upper Fruitland, San Juan and Nenahnezad. Navajo Nation President Begaye maintained irrigation and livestock restrictions on most of the San Juan River until October 15.

During the response to the Gold King Mine Release, EPA had calls multiple times a week to share data and information with Navajo Nation. We discussed our interpretation of the data during several of these calls. EPA has continued to share analysis and data related to the Animas and San Juan Rivers with Navajo Nation after the response. Notable discussions related to data occurred during an October 15, 2015 meeting EPA had with Navajo Nation in Window Rock, as well as a February 5, 2016 meeting in Denver that was attended by Navajo Nation representatives as well as representatives from other jurisdictions. During the February 5 meeting, EPA's Office of Research and Development (ORD) shared its preliminary analysis of the fate and transport of metals in the Animas and San Juan Rivers with Navajo Nation and other stakeholders. The peer review process for ORD's analysis is almost complete. EPA can brief Navajo Nation, as well as any researchers that are working with Navajo Nation on Gold King Mine related issues, on our response to the peer review comments and the final analysis.

On March 24, EPA finalized the "Post-Gold King Mine Release Incident: Conceptual Monitoring Plan for Surface Water, Sediments, and Biology." The first set of sampling for the Post-Gold King Mine Release Monitoring Plan occurred last Fall. EPA compared the data that was collected for the San Juan River with recreational screening levels and Navajo Nation agricultural screening levels. There were no exceedances of recreational screening levels or Navajo Nation's agricultural screening levels. The second round of sampling under this EPA monitoring plan was conducting the week of March 22, 2016. The Navajo Nation EPA coordinated with the EPA Contractor to assist them in the field.

EPA will be allocating \$2 million to help states and tribes monitor water quality conditions in the Animas and San Juan Rivers. Navajo Nation had the opportunity to comment on the allocation of the water monitoring funds amongst the different jurisdictions, and EPA responded to those comments prior to finalizing the allocation amounts. Navajo Nation will receive \$465,000 of the \$2 million for surface and sediment monitoring. Navajo Nation EPA is currently discussing its draft workplan for these funds with U.S. EPA.

**Commented [CS1]:** Needs to be reviewed by Water

On March 10, U.S. EPA awarded \$157,756 to Navajo Nation government agencies for costs incurred during the response to the August 2015 Gold King Mine release. Navajo Nation has accepted this award but is still reviewing the terms and conditions of the grant. This award included \$63,824 for water sampling and related supplies. Once Navajo Nation completes its review of the initial award, EPA will continue to discuss additional costs for which reimbursement was requested, including future costs for soil monitoring and plant and animal testing.

Academic researchers supported by federal funding are also assessing any potential human health impacts. University of Arizona researchers Karletta Chief and Paloma Beamer have received a \$434,000 grant from the National Institute of Environmental Health Sciences (NIEHS) to work with the Navajo Nation on assessing exposure and risk perceptions following the Gold King Mine spill.

#### Water Treatment Facility at the Headwaters of the Navajo Nation

[Based on Enrique's April 5 conversation with the President, Navajo Nation is interested in re-starting a drinking water treatment facility in Shiprock; need to get input from R9 Water on how to address this.]

**Commented [BT2]:** My understanding is that Navajo has not added this to their list of priorities for (drinking water funding?). Trying to dig up old emails on this, but I think that would be the process through which they would need to request funding for this.

#### Agriculture along the San Juan River

Supporting farmers and ranchers in Navajo communities during the response was one of EPA's highest priorities. EPA spent over a million dollars supporting the delivery of agricultural water and hay to Navajo farmers and ranchers along the San Juan River. EPA also used Navajo Nation's agricultural and livestock screening levels in our analysis of the monitoring data from the response.

During the response to the Gold King Mine Spill, metal concentrations exceeded Navajo Nation's agricultural screening levels for short durations. However, metal concentrations in San Juan River surface water exceed Navajo Nation's agricultural screening levels in historical data for short durations as well. For example, twice during the sampling that occurred during the Gold King Mine response, lead exceeded Navajo's agricultural screening levels for a single daily sample, and fell well below the screening level on the following day. This is consistent with brief exceedances of screening levels that occurred in the 2012 – 2013 timeframe. Given the short duration of the exceedances, EPA believes the San Juan River is safe for agriculture and irrigation.

EPA is aware of and supports the plethora of work being conducted by the U.S. Department of

Agriculture in partnership with Navajo Nation. This work is summarized in a separate appendix attached to this letter.